APR 15 1957
JOHN T. FEY, Cl

Supreme Court of The United States

OCTOBER TERM, 1956

No. 913

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

versus

MRS. THELMA WEBER,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

STANLEY E. LOEB,
318 Richards Building,
New Orleans, 12, Louisiana,
Attorney for Petitioner.

GORDON BOSWELL,
MARCEL LIVAUDAIS, JR.,
Of Counsel.

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STATUTE CITED

Louisiana Revised Civil Code, Article 2315 4

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No.

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

versus

MRS. THELMA WEBER,
Respondent.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 8, 1957.

Citation to Opinions of the Lower Courts

The opinion of the District Court[1] is reported in 139 Fed. Supp. 568. The opinion of the Court of Appeals, reproduced in full in Appendix A, p. 8, *infra*, is not yet reported. The order denying petitioner's application for rehearing is reproduced in Appendix C, p. 14, *infra*.

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[1]Record 87-94.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on February 8, 1952.[2] Petitioner's application for rehearing was denied by order dated and entered on March 11, 1957.[3] The jurisdiction of this Court is invoked under the provisions of 28 United States Code 1254 (1).

Question Presented

Whether the language of subsection 933 (f) of the United States Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 933 (f)) is mandatory or directory, consequently, whether claimant, having filed with the deputy commissioner an election to sue a third party, is required to file the third-party suit within the time prescribed in 33 United States Code 933 (f) in order to preserve a claim against the employer for deficiency compensation.

Statute Involved

The statute involved in this litigation is the United States Longshoremen's and Harbor Workers' Compensation Act, 33 United States Code 901 seq., particularly, subsection 933 (f), which reads:

> "If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the

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[2]Appendix B, p. 13, *infra*.
[3]Appendix C, p. 14, *infra*.

employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."[4]

Subsection 913 (a) reads:

"The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred."[5]

Statement of the Case

Respondent's husband, Magnus T. Weber, died on August 23, 1950.[6] Alleging that Weber's death was caused by accident sustained while in the course of his employment by petitioner's insured, Charles Ferran & Company, as a harbor worker aboard a vessel owned by the United States, respondent filed with the deputy commissioner at New

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[4]Section 933 is reproduced in its entirety in Appendix D, p. 15, *infra*.
[5]Section 913 is reproduced in its entirety in Appendix E, p. 18, *infra*.
[6]Record 29.

Orleans Federal Form U. S.—213 "Notice of Election to Sue," making the election under 33 United States Code 933 to pursue her remedy and that of her minor child against the third party, but making a claim for any deficiency between the amount recovered from the third-party and any amount payable by the employer on account of Weber's death. The notice of election to sue was filed on October 23, 1950.[7] No suit was filed against the third-party until February 29, 1952, when respondent, acting individually and on behalf of her minor child, instituted the third-party proceedings by filing a libel and complaint against the United States in United States District Court for the Southern District of Texas, Houston Division, demanding damages for Weber's alleged injuries and death.[8]

Respondent's suit was dismissed by judgment of the District Court for the Southern District of Texas, on motion of the United States on the ground that respondent's suit was filed more than one year from the date of Weber's death, consequently, was barred by the limitations of one year provided by the death-by-wrongful-act statute of Louisiana.[9] The order of dismissal was entered on June 18, 1953.[10] Thereafter, on November 10, 1954, respondent sought to enforce her claim and the claim of her minor child for deficiency compensation.[11] No compensation has been paid to respondent, either individually or for the use and benefit of her minor child.

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[7]Record 30.
[8]Record 30, 67.
[9]Article 2315 of the Louisiana Revised Civil Code.
[10]Record 79-83.
[11]Record 37.

At the first hearing held by the deputy commissioner on April 12, 1955, petitioner herein urged, among other defenses, that claimants' rights were barred by limitation due to respondent's failure to have filed the aforesaid third-party suit against the United States within the time provided by 33 United States Code 933 (f).[12] The deputy commissioner admitted evidence that established the fact that respondent's third-party suit was filed on February 29, 1952, more than one year after the date of Weber's death, and the deputy commissioner held that respondent's failure to have filed the third-party suit within the period prescribed in 33 United States Code 933 (f) barred her right and the right of her minor child to demand deficiency compensation.[13]

Respondent timely filed a libel and complaint in United States District Court for the Eastern District of Louisiana, New Orleans Division, contesting the correctness of the deputy commissioner's ruling. The District Court held that 33 United States Code 933 (f) does not refer to any time within which the third-party suit may be filed and specifically held that the words "institutes proceedings" as used therein refer only to filing claim for workmen's compensation and do not apply to filing suit against a third party.[14]

Petitioner herein appealed the District Court's judgment to the United States Court of Appeals for the Fifth Circuit. That court, while disagreeing with the reasoning of the District Court, affirmed the judgment by construing the

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[12]Record 42.
[13]Record 30-31.
[14]Record 87-94.

language of the aforesaid 33 United States Code 933 (f) as being "directory" and not "mandatory".[15]

Reasons Why Writ Should Be Granted

The United States Longshoremen's and Harbor Workers' Compensation Act is, indeed, an important Federal statute. The question here presented has not heretofore been passed on by any appellate Court.[16] Section 933 makes provisions for the benefit of employee and employer alike. Employees are provided with the means of pursuing third-party wrongdoers who injure them and are afforded the opportunity to recover damages rather than compensation. Employers are benefited by the opportunity to shift the burden of injured employee support to third-party wrongdoers. Subsection 933 (f) clearly reflects the intention of the Congress to implement the other provisions of the section by giving an injured employee the right to pursue a third-party wrongdoer and still preserve his rights to recover deficiency compensation from his employer. But, in its wisdom, Congress imposed certain duties and obligations on the injured employee or on the dependent, and they are spelled out in subsection (f) of Section 933.

The deputy commissioner interpreted subsection 933 (f) in accordance with his appreciation of the ordinary meaning of the words and attached to those words the logical implication that they require diligent action on the part of the employee or dependent; the District Court undertook to interpret subsection 933 (f) in a manner that deprives the words employed in the subsection of their obvious

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[15]Appendix A, p. 8, *infra*.
[16]Appendix A, p. 12, *infra*.

meaning; the Court of Appeals rejected the strained interpretation of the District Court but effectively destroyed the purpose of subsection 933 (f) by holding that the language is "directory" and not "mandatory".

Thus, three different tribunals have given three different interpretations to the subsection under study and the importance of the statute suggests that this question of Federal law should be settled by this Court.

WHEREFORE, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court entered herein.

STANLEY E. LOEB,
318 Richards Building,
New Orleans, 12, Louisiana,
Attorney for Petitioner.

APPENDIX A

In the United States Court of Appeals
For the Fifth Circuit

No. 16225

American Surety Company of New York and Joseph H. Henderson, Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor,

Appellants,

versus

Mrs. Thelma Weber,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(February 8, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge: This appeal from a decision[1] in a Longshoremen's and Harbor Workers' compensation

[1] 139 Fed. Supp. 568.

proceeding, 33 U.S.C. 901 et seq., tests for error, the conclusion of the district judge, that the deputy commissioner erred in finding and holding that, under 33 U.S.C. 933, the failure of the compensation claimant, Mrs. Weber, to file a third party action for herself and minor child within one year of the death of her husband barred her claim for compensation under the act, and his judgment directing the deputy commissioner to proceed with a hearing on the merits of her claim.

It thus, on undisputed facts,[2] presents a single question

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[2]Magnus T. Weber, claimant's husband, died on Aug. 23, 1950, allegedly from injuries suffered in the course of his employment as longshoreman by Charles Ferran & Co., Inc., at New Orleans, Louisiana. On Oct. 23, 1950, Mrs. Weber filed notice of election to sue a third party and instituted proceedings before respondent by the filing of a claim for any deficiency between the amount recovered in the third party action and the amount to which claimant and her child would be entitled under the Longshoremen's and Harbor Workers' Compensation Act. The third party suit, filed on Feb. 28, 1952, was subsequently dismissed by the court after arguments and briefs. Thereafter, when libellant sought to press her claim for deficiency compensation, the Deputy Commissioner ruled as stated above.

of statutory construction involving three sections[3] of the Act.

The district judge rejected the respondent's view that when 33 U.S.C. 933(f) says "institutes proceedings within the period prescribed in Sec. 913 of this chapter", it refers to third party proceedings, that the reference to Section 913 is merely for the purpose of providing a time limitation on the filing of the third party action, and that it has no reference to the substance of Sec. 913 which concerns, of course, not third party actions but claims for compensation under the Act.

In accordance with his own construction of the statute, the district judge thought and said that the reference in

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[3]33 U.S.C. Sec. 933(f) reads:

"If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

33 U.S.C. Sec. 933(d) reads:

"Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceedings."

33 U.S.C. Sec. 913(a) reads:

"The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without any award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

Sec. 933, to instituting proceedings within the period prescribed in Section 913, was for the purpose, and had the effect, not of *fixing a one year period for filing a third party proceeding but of referring to the time limitation on filing the claim for compensation and of fixing the same time limitation for filing the claim, whether it was or was not coupled with an election to sue a third party.*

Basing his opinion upon this view, he held that the invoked section did not set any time for filing the third party action and that the commissioner's conclusion and decision that the claim was barred was therefore wrong.

We agree with the district judge's conclusion that the deputy commissioner's decision was wrong and should be set aside. We cannot agree, however, with the reason he gave for it, that the language in Sec. 933(f) "institutes proceedings within the period prescribed in Sec. 913" refers not to the third party action but to the claim for compensation. Nevertheless, though we think that the deputy commissioner was right, the district judge wrong in this respect,[4] we think it plain that there is nothing in the statute which, in the circumstances of this case supports the result found by the commissioner. This is so because nowhere in the statute is it provided that the failure to file the third party action within one year bars the claim for compensation. The language is directory, not mandatory, and, in the absence of some positive showing of undue delay and of injury resulting from the failure to file within

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[4]See Terminal Shipping Co. v. Branham, 47 F. Supp. 561, at p. 570.

one year, it would be, we think, an unreasonable construction to read it as a statute automatically forfeiting claims to compensation without a showing of prejudice or injury. While the precise question here presented has not been authoritatively decided in any appellate court, in our opinion the decisions, dealing with analogous situations and generally giving the statute a liberal construction, preclude the construction contended for here. Cf. *Am. Lumbermen's Cas. Co. v. Lowe*, 70 F(2) 616, 618; *Associated General Contractors of America, Inc. v. Cardillo*, 70 App. D. C. 303, 106 F(2) 327; *Chapman v. Hoage*, 56 S. Ct. 333, 298 U.S. 526, 80 L.Ed. 370; *Voris v. Gulf-Tide Stevedores, Inc.*, 211 F(2) 549; *Terminal Shipping Co. v. Branham*, 47 F. Supp. 561.

The judgment was right. It is AFFIRMED.

(Signed) EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit.

A True Copy:
Teste:

(SEAL)

APPENDIX B

JUDGMENT

Extract from the Minutes of February 8, 1957.

American Surety Company of New York and Joseph H. Henderson, Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor,

No. 16225. versus

Mrs. Thelma Weber.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of March 11, 1957.

American Surety Company of New York and Joseph H. Henderson, Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor,

No. 16225. versus

Mrs. Thelma Weber.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX D

33 United States Code 933

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to —

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes

proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

APPENDIX E

33 United States Code 913

(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for certiorari has been served by the undersigned having mailed copies thereof on April ____, 1957, addressed as follows:

John F. Connolly, Esquire,
Attorney for Respondent,
Richards Building,
New Orleans, 12, Louisiana;

Prim B. Smith, Jr., Esquire,
Assistant United States Attorney,
Federal Building,
New Orleans, 12, Louisiana;

Arthur J. Mandell, Esquire,
Attorney for Respondent,
South Coast Building,
Main and Rusk Streets,
Houston, 2, Texas; Via Air Mail

Robert J. Skahan, Esquire,
Assistant Solicitor,
Department of Labor,
Washington, D. C. Via Air Mail

STANLEY E. LOEB
Attorney for Petitioner

No. 913

RECEIVED
MAY 9 1957
OFFICE OF THE CLERK
SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

AMERICAN SURETY COMPANY OF NEW YORK, ET AL, Petitioner

versus

MRS. THELMA WEBER, Respondent

TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

COMES NOW THELMA WEBER, for herself and in behalf of her minor daughter Carolyn Louise Weber, Respondent herein, and moves this Honorable Court to permit her to dispense with printing her reply to the Application for Writ of Certiorari filed by Petitioner American Surety Company of New York and grant her leave to file typewritten copies of said reply, and in support thereof would respectfully show the Court as follows:

Respondent and her minor daughter claimed compensation for the death of Magnus T.Weber under the Longshoremen's and Harbor Workers' Act. The United States Deputy Commissioner at New Orleans, Louisiana, denied her compensation under the Act without a hearing on the merits, but simply on the ground that she has failed to file a third party suit within one year after the death of the said Magnus T.Weber. Within the time and in the manner provided for by law, Respondent appealed from such order

to the United States District Court for the Eastern District of Louisiana, and Judge Skelly Wright, after a full hearing, reversed the decision of the Commissioner and ordered the Commissioner to proceed with the case on the merits. Petitioner appealed said decision to the Court of Appeals for the Fifth Circuit, and said Court affirmed the decision of the district judge. Petitioner has filed its application for Writ of Certiorari to this Court.

Respondents would respectfully show your Honorable Court that neither Mrs. Thelma Weber, nor her minor daughter, are in position to pay for the cost of the printing of the brief in opposition to Petitioner's application for a writ, and at the same time provide themselves with the necessities of life. Further, if the Petition should be granted, they are unable to pay the fees and costs for the printing of briefs in reply to such further briefs as may be filed by Petitioner.

In support of her motion Respondent Mrs. Thelma Weber attaches hereto her affidavit.

WHEREFORE, PREMISES, CONSIDERED, Respondent prays that the Court grant her leave to file typewritten copies of her brief in opposition to the petition for Certiorari and dispense with the printing thereof.

Respectfully submitted,

MANDELL & WRIGHT,

BY _____,
Attorneys for Petitioner,
7th. Floor, South Coast Building,
Main at Rusk Avenue,
Houston 2, Texas.

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THE STATE OF LOUISIANA)
PARISH OF ORLEANS)

BEFORE ME, a NOTARY PUBLIC, in and for the State of Louisiana, Parish Of Orleans, personally appeared Mrs.Thelma Weber, who after being by me duly sworn,on oath states that:

Her name is Mrs.Thelma Weber and that she is Respondent in the case styled American Surety Company of New York vs.Mrs.Thelma Weber, which is docketed No. 913, October Term 1956, in the Supreme Court of the United States. That she is still a widow and her own work is the sole support for herself and her minor child; that because of her poverty she is unable to pay or give security for costs and still be able to provide herself and dependents with the necessities of life.

Mrs.Thelma Weber

SUBSCRIBED AND SWORN TO BEFORE ME this the 3rd day of May,1957.

Joseph A. Barreca

Notary Public in and for Parish of Orleans, State of Louisiana

JOSEPH A. BARRECA
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

NO. 913

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner

versus

MRS. THELMA WEBER,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OF COUNSEL:

ARTHUR J. MANDELL

MANDELL & WRIGHT
7th Floor South
Coast Building
Houston 2, Texas

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

NO. 913

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner

versus

MRS. THELMA WEBER,
Respondent

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OF COUNSEL:

ARTHUR J. MANDELL

MANDELL & WRIGHT
7th Floor South
Coast Building
Houston 2, Texas

OPINIONS BELOW

The opinion of the District Court[1] is reported in 139 Fed.Supp. 568. The Opinion of the Court of Appeals is repreduced in Appendix A, page 8 of the Petitioner's Application for Writ of Certiorari, and is not as yet reported. Petitioner's Motion for Rehearing was overruled on the 11th day of March, 195[illegible]

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[1]Record, pps. 87-94

JURISDICTION

Petitioner does not present the jurisdictional requirements set forth in the United States Supreme Court Rules 38 (5 a and b) and 19(b) to warrant the granting of the Writ, and Respondent denies that the decision of the Court of Appeals for the Fifth Circuit is not in harmony with or is repugnant to the statute involved. (33 U.S.C. 901 seq.)

QUESTION PRESENTED FOR REVIEW

Whether a widow and orphan of a deceased longshoreman, otherwise entitled to compensation under the Harbor Workers Act,[1] in the absence of a claim and showing of prejudice to the employer or insurance carrier, are, as a matter of law, barred from such benefits because they did not file a third party suit for damages[2] within the same time required to file claim for compensation.[3]

STATEMENT OF THE CASE

Respondent accepts as substantially correct the recitation contained in Petitioner's application with reference to the facts leading to the filing of her suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, except that such Statement of Facts fails to set out that at the Hearing before the Commissioner Petitioner did not claim any prejudice resulting to it by the failure to file such suit, but on the contrary having first made such claim (Record - p. 42, subsection 2,

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[1]Sec. 901, et seq, Title 33, U.S.C.
[2]Sec. 933 (f) U.S.C.
[3]Sec. 913 (a) Title 33

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p. 43,) item 2 of Defendant's Issue was withdrawn and and Petitioner relied on only three grounds, as follows:

(1) That suit against the third party was not filed within one year after Magnus T. Weber's death, within the same limit for the filing of claim for deficiency, and is therefore barred;

(3) That the defendant also denied that the deceased employee's death was caused by carbon tetrachloride poison;

(4) In the alternative, defendants denied that any poisoning the deceased employee contracted was contracted while in the employ of Charles Ferran & Company.

For the purpose of the question presented here, points three and four are to be left for the decision of the Deputy Commissioner upon a hearing on the merits. The only point material before this court is Point 1.

REASON WHY WRIT SHOULD BE DENIED

Petitioner has failed to show that its application comes under any of the applicable rules of the United States Supreme Court. Its statement on "Jurisdiction" does not set out any of the requirements provided for in Rule 38 (5 a and b), or Rule 19(b).

The real question here presented has heretofore been passed on by this Court in Chapman vs. Hoage, 56 S.Ct. 333, 298 U.S. 526, 80 L.Ed. 370, and decided adversely to Petitioner's contention here.

While it is true that in the case at bar the Court of Appeals affirmed the judgment of the court below on a different ground than the one given by the district judge, yet, even the Circuit Court held that in absence of untimely delay and

of injury resulting from the failure to timely file a Third Party Suit such failure does not bar injured longshoremen, nor their beneficiaries from the benefits of the provisions of the Act; nor relieve the employer or his insurance carrier of their liability under the Act. The Court of Appeals having reached a proper result for whatever reason it may have assigned, it would serve no useful purpose to grant Petitioner's application for the Writ.

ARGUMENT

Petitioner's contention that the widow and the minor are barred, as a matter of law, from receiving any compensation under the Act simply because the suit against the Third Party Defendant was not filed within one[1] year from the date of the death of the deceased, Magnus T. Weber, even though Petitioner has made no claim nor presented any evidence of prejudice[2] is contrary to the holdings in the following cases:

Chapman vs. Hoage, 56 S.Ct. 333, 298 U.S. 526, 80 L.Ed. 370;

Weyerhaeuser Timber Co. vs. Marshall, 102 F.2d. 78;

American Lumbermen's Mutual Casualty Company vs. Lowe, 70 F.2d. 616, 618;

Lumbermen's Mutual Casualty Company vs. Lowe, 5 F.Supp. 447.

In Chapman vs. Hoage, supra, this Court stated:

"Injured employee's election to pursue his remedy against third person does not deprive him of right to compensation from employer,

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[1]Texas Limitation Statute in such cases is two years, Vernon's Annotated Statutes, Art. 5526

[2]Record pps. 42-43

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whose rights and liabilities, so far as he is in position of a surety or indemnitor, are governed by general principles of suretyship, where not otherwise prescribed by statute."

In the Weyerhaeuser case, the Court in rejecting a similar contention stated as follows;

"A second contention of Appellant is that the failure of claimant to file an action against a third party within the time prescribed by the statute of limitations[3] effected a loss of their subrogation rights and thus relieved them from liability under the Act. As to this point our ruling is controlled by the case of Chapman vs. Hoage, 296 U.S. 526, 56 S.Ct. 333, 80 L.Ed. 370."

On page 81, the Court stated as follows:

"In the present case, as in the Chapman case, supra, the insurer, insisting that it was discharged by the mere failure of the claimant to file action against the third party, has offered no evidence that such failure was prejudicial to it."

In the Lowe case, 5 F.Supp. 447 at p. 449, the District Judge stated as follows:

"The statute does not in terms impose any penalty for a discontinuance, but does impose

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[3] Statute of Limitations of the State of Washington governing an action for wrongful death is three years, and the third party was, therefore, protected by that statute on and after March 3, 1935. Remington's Revised Statutes of Washington, Sections 155, 159, 193.

a penalty for compromising, for less than the amount would be allowed as compensation, an action brought by claimant against a third party without the written consent of the carrier.

"There does not appear to be any decision of any court construing the statute in question with reference to the question in issue.

"The statute was remedial in its character and should be liberally construed to accomplish its purpose, Rothschild & Co. vs. Marshall (D.C. 56 F.2d.) 415."

This case was affirmed on appeal. The Court said (70 F.2d. 616 at p. 618):

"It is evident that either an acceptance of compensation under (b) or a compromise with a third person and without written consent of the employer under (g) constitutes a final election that will bar other remedies. But there is nothing in (a) suggesting that bringing an action against the third person amounts to a final election. Nor, in the absence of such delay as will prevent the employer or its carrier from effectively availing themselves of their rights against the third person by way of subrogation, would there seem to be adequate reason for depriving a person entitled to compensation of the right to discontinue her action and seek compensation under the statute. Such a locus poenitentiae is ordinarily available, where separate remedies against different persons exist."

In the Weyerhaeuser case, Notice of Election was given and no suit was filed whatsover. The insurer in that case insisted that the failure to file any suit at all within the three year statutory period provided for in the State of Washington barred the beneficiaries from any compensation. The Court rejected that view, stating that before the failure to file a suit pursuant to notice of election to sue may bar a beneficiary under the act from compensation, evidence showing prejudice to the employer or carrier must be brought forward. In the case at bar the contention of prejudice was not made which caused Honorable Skelly Wright, the District Judge hearing this case, to state 139 F.Supp. 568, as follows:

> ". . .Prejudice to the employer by reason of the delay in bringing the third party action was not urged before the Commissioner. Consequently, that issue is not before the Court here. (citing a number of cases.)"

It is respectfully submitted that further argument or presentation of authorities are deemed unnecessary, and that the application for writ of certiorari for the reasons hereinabove stated should be denied.

However, we earnestly suggest to the Court that the reasons given by the District Judge in reversing the Deputy Commissioner's decision are sound and should be declared by this Court to be the law. The only case cited by the Court of Appeals in support of its reasoning (sic) that Section 933 (f) require the filing of a Third Party Suit within one year is Branham, Dep. Comm. vs. Terminal Shipping Company, 47 F.Supp. 561. The Branham case, however, is no authority for the quoted proposition on two grounds; (1) It is merely dicta since such statement was not necessary for the decision of

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that case, and the Appellate Court affirmed the case on entirely different grounds (136 F.2d. 655). (2) Judge Chesnut too in the Branham case recognized that prejudice to the employer, or carrier, must result before the employer or the carrier can claim that it is relieved from liability under the Act. Moreover, since the District Court's language is mere dicta, it has no binding force. Pacific S.S. Co. vs. Peterson, 49 S.Ct. 75, 278 U.S. 130.

In any event, if by some stretch of the imagination it may be argued that the statute might be construed to mean what Petitioner contends it means, then we submit, as the Court of Appeals for the Fifth Circuit in Voris v. Gulf Tide Stevedores, Inc., (211 F.2d. 549) held, that Section 933 (f) is ambiguous, in which event it ought to be construed in support of the claimant rather than the insurance carrier, stating as follows:

> "The court below held that it was the total or gross and not the net amount of the recovery against a third party, the excess of which the employer was required to pay under 33 U.S.C.A., Section 933 (f), which provides, in part, for the payment of 'a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.' The facts being undisputed, the question presented below and here is one of interpretation of an ambiguous statute, which should be liberally construed in favor of longshoreman and harbor workers."
>
> See also Voris vs. Eickle, 74 S.Ct. 88, 346 U.S. 328.

In the case at bar it is undisputed that timely notice of election to sue and claim for compensation as provided for by the Act was filed. When such timely notice is given and claim filed Respondent has complied with all the provisions of the Act. Congress has not provided for any method by which an injured Longshoreman or his beneficiaries may be wholly barred from benefits due them under the Act, unless the beneficiaries fail to file a claim with the Commissioner within one year from the contingencies set out in Sections 913 (a), (b) and (d). The only limitation for recovery of any funds, by way of compensation, is found in Section 933 (g) which provides that if a settlement of the Third Party Suit is made without the written consent of the employer, or his insurance carrier, an injured employee, or his representative in the event of his death, can not recover any amount over and above the amount recovered by such compromise. There is not one word in the Act which shows a Congressional intent to deprive either an injured Longshoreman, or in the event of death his beneficiaries, of his or their benefits under the Act unless he fails to file a claim with the Commissioner as set out in Section 913 (a). There is nothing in Section 933 (a), through (g) which says that if a suit against a Third Party for the recovery of damages is not filed within any period of time that the right of compensation, as a matter of law, is completely barred. Therefore, assuming the most improbable, construction of the words used in Section 933 (f), i.e., "institute proceedings" to mean institute proceedings for recovery of such damages by a suit against a third party still no words are found in Section 933, nor anywhere else in the Act, which would warrant on interpretation that failure

to file a suit to recover such damages within one year penalizes the beneficiary from recovery of any benefits provided for in the Act.

Respondent respectfully, but most earnestly, suggests and contends that the words "institute proceedings" within the period provided in Section 913, as set out in Section 933 (f) have no reference to the institution of proceeding for the recover of damages from a third party. Had Congress so intended, it would have used plain and unambiguous language to do so. The words "institute proceedings" are not limited in meaning to some special type of proceeding. In this statute they are used generically, and in their generally accepted definitions. Certainly the filing of a claim constitutes an institution of proceedings. Indeed, Section 919 refers to it as a proceeding, as indeed it is.

Analyzing Section 933 (f) it simply says in the event an injured Longshoreman, or his beneficiary, decides to file a third party action for compensatory damages, they must do two things (1) Give notice of election to sue Third Party, and (2) Institute proceedings by the filing of claim with the Commissioner so as to meet the requirements of Section 913 (a). Respondent having notified the Commissioner of her election and instituted proceeding by filing claim with the Commissioner within the period prescribed by section 913 (a), she has done all that was required of her in order to be permitted to proceed with her claim on the merits. As stated, therefore, the question here is what proceeding does the Statute have reference to? The Courts have called the filing of a claim before the Commissioner institution of proceedings. Baltimore & Philadelphia Steamboat Co. vs. Norton, 284 U.S. 408, 48 F.2d.57.

It is to be noted that the Administrative Agency charged by Congress with the administration of this Act. pursuant to Section 933 (f) has itself set out the proceedings by providing for (1) Notice of Election to Sue and (2) Institute proceedings to recover an amount equal to the excess the Secretary may determine is payable for such injury if not paid by such third party.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Honorable Judge Skelly Wright, District Judge, was in all respects correct, and that the opinion of the Court of Appeals for the Fifth Circuit, arrived at a correct result, and, therefore, the Petition for Writ of Certiorari should be in all things denied on the ground set forth in 139 F. Supp. 568.

Respectfully submitted,

MANDELL & WRIGHT

By _____

Attorneys for Respondent,
Mrs. Thelma Weber,
7th Floor, South Coast Bldg.,
Houston 2, Texas.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer to Petitioner's Application for Writ of Certiorari has been served by the undersigned having mailed copies thereof on the 7th day of May, 1957, addressed as follows:

Stanley E. Loeb, Esquire
c/o Messrs. Boswell, Loeb &
Livaudais
318 Richards Building
New Orleans 12, Louisiana — Via Air Mail

Prim B. Smith, Jr., Esquire
Assistant United States Attorney
Federal Building
New Orleans 12, Louisiana — Via Air Mail

Robert J. Skahan, Esquire
Assistant Solicitor
Department of Labor
Washington, D.C. — Via Air Mail



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428468—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 913

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER

v.

MRS. THELMA WEBER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

This suit was instituted by Thelma Weber on her own behalf and on behalf of her minor child pursuant to Section 921 of the Longshoremen's and Harbor Workers' Compensation Act,[1] to set aside the deputy commissioner's order denying libellant's claim for compensation. The District Court granted the relief sought, and the Court of Appeals, although rejecting the reasoning of the District Court, affirmed. The insurance carrier, named as respondent in the original libel, now petitions this Court for a writ of certiorari.

The Government, on behalf of the deputy commissioner (also a respondent in the original libel), de-

[1] 44 Stat. 1424, as amended by 62 Stat. 603, 33 U. S. C. 901, *et seq.*

fended the libel and participated in the appeal from the ruling of the District Court. However, the deputy commissioner has not joined in the petition for a writ of certiorari, nor has he been named (as he should have been) by the insurance carrier as a respondent to the petition for a writ of certiorari. Since any modification of the decision below will affect the deputy commissioner's order as well as the administration of the Act, the Government wishes to express its acquiescence in the decision of the Court of Appeals and therefore its opposition to the carrier's petition for a writ of certiorari.

The facts of the case may be summarized as follows:

Magnus T. Weber, libellant's husband, died on August 23, 1950, allegedly from injuries suffered in the course of his employment as a longshoreman (Pet. App. 9). On October 23, 1950, Mrs. Weber filed a notice of her election to sue a third party and of her claim for any deficiency between the amount recovered in the third party action and the amount to which she and her child were entitled under the Longshoremen's and Harbor Workers' Compensation Act (Pet. App. 9).

Mrs. Weber filed her third party suit on February 28, 1952 (Pet. App. 9). After argument and briefs, this suit was dismissed as out of time (Pet. 4). Thereafter Mrs. Weber sought to enforce her claim for deficiency compensation. The deputy commissioner held that this claim was barred by 33 U. S. C. 933 which, according to the deputy commissioner's interpretation, required the compensation claimant to file

the third party action within one year of the death of her husband (R. 28–31). The statute (33 U. S. C. 933 (f)) provides that deficiency compensation shall be awarded if the person electing to sue the third party "institutes proceedings within the period prescribed in section 913 of this chapter". Section 913 (33 U. S. C. 913) provides that "the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death". The claimant urged that the word "proceedings" in the phrase "institutes proceedings within the period prescribed in section 913" referred to the claim for compensation rather than the filing of suit against the third party. The deputy commissioner rejected this reasoning, held that "proceedings" referred to the third party suit, and therefore refused to award compensation.

The Government agreed that "proceedings" could refer only to the third party action and that the strained construction urged by claimant did violence to the language of the statute; therefore it defended the deputy commissioner's order in the District Court. When the District Court accepted the claimant's interpretation of the statute (R. 87–94), the Government participated with the insurance carrier in appealing the decision to the Court of Appeals for the Fifth Circuit.

The Court of Appeals rejected the reasoning of the District Court and held that "proceedings" in Section 913 refers to the third party action and not the claim for compensation (Pet. App. 8–12). However, it further held that the language was directory, not man-

datory; and that failure to institute a third party suit within one year would bar a claim for compensation only on some positive showing of undue delay and of injury to the carrier resulting therefrom. In other words, unless the carrier demonstrated that failure to file a third party suit within one year prejudiced its right of subrogation to the claimant's cause of action against the third party,[2] the claim for deficiency compensation would not be barred.

The Government believes that this is not an unreasonable interpretation of the statute and is in accord with the policy of interpreting this remedial legislation liberally in favor of claimants. *Baltimore and Philadelphia Steamboat Co.* v. *Norton,* 284 U. S. 408, 414; *South Chicago Coal & Dock Company* v. *Bassett,* 104 F. 2d 522, 526 (C. A. 7) (and cases cited therein), affirmed, 309 U. S. 251; *Candado Stevedoring Corp.* v. *Lowe,* 85 F. 2d 119, 121 (C. A. 2), certiorari denied, 299 U. S. 588; *Associated General Contractors* v. *Cardillo,* 106 F. 2d 327, 329 (C. A. D. C.); *Terminal Shipping Company* v. *Branham,* 47 F. Supp. 561 (D. Md.).

Moreover, although the precise question involved herein appears not to have been decided, the decision of the Court of Appeals is in accord with the policy laid down by this Court and followed in lower courts of not allowing third party actions to bar claims for compensation unless the carrier can demonstrate that its right of subrogation has been prejudiced. Thus in *Chapman* v. *Hoage,* 296 U. S. 526, the claimant filed an election to sue the third party, proceeded to file

[2] See 33 U. S. C. 933 (d).

suit, but, after the statute of limitations had run, neglected to pursue the third party action to final judgment. Nevertheless, this Court permitted the claimant thereafter to enforce her claim for deficiency compensation. The decision is based on the fact that the third party action was so insubstantial (the decedent having been clearly guilty of contributory negligence) that failure to pursue the third party action could not have been prejudicial to the carrier's right of subrogation. See also *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. 2d 616 (C. A. 2); *Atlantic Stevedoring Co.* v. *Lowe,* 18 F. Supp. 602 (E. D. N. Y.). These cases arising under the Longshoremen's Act require a positive showing of prejudice before the court will bar a claim for deficiency compensation and are thus in accord with the policy of the Court of Appeals decision in the instant case. It would seem therefore that this case does not merit further review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MAY 1957.

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